123

(4)

No. 08-822

FILED
MAR 15 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

SCOTT A. MCLAUGHLIN
Petitioner,

v.

STATE OF MISSOURI
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

CAPITAL CASE
REPLY TO BRIEF IN OPPOSITION

DEBORAH B. WAFER
OFFICE OF THE PUBLIC DEFENDER
1000 St. Louis Union Station
Suite 300
St. Louis, MO 63103
(314) 340-7662, ext. 236

CHARLES OGLETREE*
ROBERT J. SMITH
125 Mount Auburn St.
Third Floor
Cambridge, MA 02138
(617) 495-8285

**Counsel of Record for Petitioner*

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

I. THE QUESTIONS PRESENTED ARE SQUARELY RAISED ON THIS RECORD. 1

A. Petitioner Preserved These Questions Presented. 1

B. The Missouri Supreme Court Decided These Questions. 4

II. The State's Brief Underscores The Need For This Court's Intervention. 5

III. The Split Among the State Courts of Last Resort is Real, Persistent, and Outcome Determinative in Capital Cases. 8

CONCLUSION 9

TABLE OF AUTHORITIES

CASES:

Lebron v. National R.R. Passenger Corp., 513 U.S. 374 (1995) 1, 4

Ring v. Arizona, 536 U.S. 584 (2002) 1, 2, 5-8

State v. Gill, 167 S.W.3d 184 (Mo. 2005) 6

State v. Glass,
136 S.W.3d 496 (Mo. banc 2004) 6

State v. Whitfield,
107 S.W.3d 253 (Mo. 2003) 7, 8

State v. Zink,
181 S.W.3d 66 (Mo. banc 2006) 4

United States v. Williams,
504 U.S. 36 (1992) 4

Yee v. City of Escondido, Cal.,
503 U.S. 519 (1992) 1

Zink v. State,
_ S.W.3d _ , 2009 WL 454283
(Mo. banc 2009) 6

CONSTITUTIONAL PROVISIONS:

Sixth Amendment 1, 2, 7
Eighth Amendment 1, 2, 7
Fourteenth Amendment 1, 2, 7

STATE RULES:

Mo. Supreme Court Rule 84.17 3

RSMo 565.030.4 ..... 1, 2, 4, 5, 6

OTHER AUTHORITIES:

Adam Thurschwell, After Ring,
15 Federal Sentencing Reporter 97
(Dec. 2002) 7

Scott McLaughlin submits this reply in support of the Petition for a Writ of Certiorari that he filed on December 29, 2008.

I. THE QUESTIONS PRESENTED ARE SQUARELY RAISED ON THIS RECORD.

A. Petitioner Preserved These Questions Presented.

The state's waiver argument lacks merit. Br. in Opp. at 8. The Petition challenges Section 565.030.4's constitutionality based on the same Sixth, Eighth, and Fourteenth Amendment claims pressed below. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").

Petitioner argued that Section 565.030.4 violates *Ring* v. *Arizona,* 536 U.S. 582 (2002), by allowing a judge to "make death-eligibility fact-findings whenever 'required to determine punishment for murder in the first-degree.'" Pet. Br. 61-62. This Court has jurisdiction over any argument subsumed by McLaughlin's constitutional challenge to 565.030.4--the statute governing the weighing process. *Yee*, 503 U.S. at 534-35 ("Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate *claims*. They are, rather, separate *arguments* in support of a single claim-that the ordinance effects an unconstitutional taking.") (emphasis in original); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379-80 (1995)

("Lebron's contention that Amtrak is part of the Government [an argument that he had expressly disavowed below] *is in our view not a new claim* within the meaning of that rule, but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment.")

Though unnecessary to invoke this Court's jurisdiction, Petitioner raised a specific objection to 565.030.4's weighing determination within the same "point relied on," and on the same grounds, that he challenged 565.030.4 more broadly. This argument took two forms. Arguing first that 565.030.4 itself did not require unanimity, Petitioner asserted that jury "instructions 24 and 26—MAI-CR3d 314.44 and 314.46—incorrectly told the jury it must unanimously find that the mitigating circumstances outweighed the aggravating circumstances." Pet. Br. 60. Second, McLaughlin asserted that this backwards unanimity violated *Ring* because even if 11 of the 12 jurors had "concluded" that mitigation outweighed aggravation,

> . . . the jury would have to indicate on the verdict form that it did *not* find mitigation outweighed aggravation. The jury's verdict of "unable to decide or agree" is unreliable; the death sentence imposed is equally unreliable and violates Scott's rights to jury trial, reliable sentencing, and due process. U.S.Const., Amend's VI, VIII, and XIV.

Pet. Br. 61-62)(emphasis supplied); *id.* ("Although the Court may keenly appreciate the need to bring Missouri's capital statutory scheme into line with

Ring and its progeny, that task is for the legislature . . .").

The Missouri Supreme Court misread Petitioner's argument to state merely a "jury instruction" claim without citation to "any authority." Pet. App. A. 15a. McLaughlin set the record straight in his motion for re-hearing: "The Court, as shown by its opinion, overlooks material matters of law and fact in connection with MAI-CR3d 314.44's requirement that the jury unanimously agree that the mitigating evidence outweighs the aggravating evidence." *See Mo. Supreme Court Rule 84.17* ("The purpose of a motion for rehearing is to call attention to material matters of law or fact overlooked or misinterpreted by the court, as shown by its opinion . . .."). Mr. McLaughlin continued,

> Appellant argued in his brief that MAI-CR3d 314.44's requirement of unanimity imposed a burden not found in the statute. The underlying problem is, in fact, much greater than that. The problem is not only that the Instruction violates due process by imposing an unwarranted burden of unanimity. The problem is that because this is a death-eligibility step, the burden should be on the state – not on the defendant.
>
> Even if this Court had never issued *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), as a matter of constitutional due process, the death-eligibility steps of Section 565.030.4(2) and (3), RSMo. (Supp. 2007), would still

> have to be proved by the state, against the defendant, to establish the defendant's eligibility for the sentence of death. This Court has said that §565.030.4(3) is a death-eligibility step. *Whitfield*, *supra*. The state, then, must prove this death-eligibility fact against the defendant.

B. The Missouri Supreme Court Decided These Questions

The opinion below resolves the questions presented here. *See Lebron*, 513 U.S. at 379 ("Our practice "permit[s] review of an issue not pressed so long as it has been passed upon...." *United States v. Williams*, 504 U.S. 36, 41 (1992)).

The Missouri Supreme Court held that the "judge below did not err in reconsidering the facts and determining that under all of the circumstances death should be imposed" because the "jury had found the facts necessary to make a defendant eligible for a death sentence under 565.030.4," including the specific finding "that it [the jury] could not unanimously conclude that the evidence in mitigation outweighed the evidence in aggravation of punishment." Pet. App. A. 11a-12a. Reviewing for plain error, the Missouri Supreme Court also found ". . . no error of constitutional proportions" in the[] [jury] instructions and re-affirmed its "holding in [*State v.*] *Zink*[1] that under section 565.030.4(2), the jury must unanimously decide that the mitigating evidence outweighs the aggravating evidence in

[1] 181 S.W.3d 66, 74 (Mo. banc 2006)

order to be required to return a life sentence." *Id.* at 16a-20a.[2]

II. The State's Brief Demonstrates The Need For Review.

Despite the State's allegations to the contrary, the Missouri Supreme Court has never even hinted at backing away from its holding that *Ring* requires a jury--rather than a judge--to determine whether mitigating evidence outweighs aggravating evidence. In fact, the decision below acknowledges the rule:

> "[I]n *State v. Whitfield,* 107 S.W.3d 253, 258 (Mo. banc 2003), [the Missouri Supreme] Court applied the principles of *Ring* to section 565.030. *Whitfield* noted that in this section the legislature conditioned an increase in punishment from life imprisonment to death on the jury following a four-step process (since reduced to three steps [with the weighing step left intact]), all but the last step of which required the jury to make specific factual findings."

Pet. App. A. 7a-8a.[3]

---

[2] Moreover, as the state acknowledges, opp. brief at 19-20, the Missouri Supreme Court has repeatedly addressed and rejected petitioner's claim that Ring requires the state to prove, beyond a reasonable doubt, that mitigation does not outweigh aggravation. Thus, the comity concerns that traditionally drive the waiver rule are not present here.

[3] No precedent supports the State's claim that the Missouri Supreme Court has backed away from *Whitfield*. *See,*

Though holding that *Ring* requires a jury to determine the weighing step, the Missouri Supreme Court continues to hold that "[n]othing in *Whitfield* or in section 565.030.4 requires the jury to make the findings in steps 2 and 3 beyond a reasonable doubt." *State v. Glass*, 136 S.W.3d 496, 521 (Mo. banc 2004). Despite the Missouri Supreme Court's contrary approach, the Sixth and Fourteenth Amendment commandments embodied in *Apprendi* come as a package. Either *Ring* applies, and the state must prove beyond a reasonable doubt that mitigation does not outweigh aggravation, or it does not, and no constitutional bar prohibits a judge from conducting the weighing determination.

The state's appeal to the "plain language of Missouri's capital-sentencing statute" does nothing to ease the tension between the *Apprendi-Ring* rule and the opinion below. The state's opposition brief argues that 565.030.4 "does not premise an increase in a capital defendant's sentence upon any finding made during the weighing step," but rather "involves a factual determination that *limits* the range of punishment to life imprisonment." Opp. Brief at 18. (emphasis in original). The Missouri Supreme Court expressly rejects this argument. *Supra* at 6; *see also*

---

e.g., *Zink v. State*, _ S.W.3d _ , 2009 WL 454283 (Mo. banc 2009) pg. 16-23 (finding in the context of a post-conviction ineffective assistance of counsel claim that the weighing determination need not be made beyond a reasonable doubt, but not questioning *Whitfield*'s holding that *Ring* requires the jury to make the weighing determination); *State v. Glass*, 136 S.W.3d 496, 520-21 (Mo. banc 2004) (finding that *Whitfield* does not require a beyond a reasonable doubt finding at the weighing stage, but not questioning *Whitfield*'s holding that *Ring* requires the jury to make the weighing determination); *State v. Gill*, 167 S.W.3d 184, 193 (Mo. 2005) (same).

Ring v. Arizona, 536 U.S. 584, 603 (2002) (A state's highest "court's construction of the State's own law is authoritative....") (internal citation omitted).

Next, the state argues that the Missouri Supreme Court's continued labeling of the weighing step as an eligibility factor "should be understood to refer to the fact that, in the weighing step, a defendant who is already eligible for a death sentence (due to the prior finding of a statutory aggravator) will either become ineligible for a death sentence or remain eligible for a death sentence." Opp. Brief. at 20. The state's argument is irreconcilable with the effects-driven approach articulated in *Apprendi*. The reality is that a convicted murderer in Missouri cannot receive a death sentence *unless* a jury has first decided that the balance of mitigation and aggravation does not favor the defendant.[4]

Finally, the state argues that the weighing step operates as a discretionary guiding hand rather than a factual finding. The Missouri Supreme Court has considered and rejected that argument. *See Whitfield*, 107 S.W.3d at 259-61 ("While the State once more argues that this [weighing step] merely calls for the jury to offer its subjective and discretionary opinion rather than to make a factual

---

[4] At a more basic level, the state conflates the narrowing function required by the Eighth Amendment with the Sixth and Fourteenth Amendment commands that a jury must find, based on proof beyond a reasonable doubt, the facts required to elevate the punishment ceiling to include a possible death sentence. See Adam Thurschwell, After Ring, 15 Federal Sentencing Reporter 97, 101-02 (Dec. 2002) available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=272871.

finding, this Court again disagrees. . . . The weighing step involves factual findings that are prerequisites to the trier of fact's determination that a defendant is death-eligible.").

III. The Split Among the State Courts of Last Resort is Real, Persistent, and Outcome Determinative in Capital Cases.

The state theorizes that the conflict among the state courts of last resort over *Ring*'s applicability at the weighing determination can be explained by operational and semantic differences among the respective state statutes. Opp. Brief at 17-19. *Whitfield* alone debunks the state's theory. *State v. Whitfield*, 107 S.W.3d 253, 261 (Mo. 2003) ("Missouri's steps 1, 2, and 3 are the equivalent of the first three factual determinations required under Colorado's death penalty statute . . ." and are "also similar to the aggravating and mitigating circumstance findings required under Nevada and Arizona law."). Despite the linguistic and operational similarities between the weighing steps in Arizona, Colorado, Missouri, and Nevada, the courts of last resort in these states are divided as to whether *Ring* requires the state to prove beyond a reasonable doubt the insufficiency of the mitigating evidence the weighing step. *See* Pet 18-19. This Court should grant review precisely because Fifteen state courts of last resort have applied federal law to functionally equivalent weighing determinations and have come out squarely divided.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DEBORAH B. WAFER
OFFICE OF THE PUBLIC DEFENDER
1000 St. Louis Union Station
Suite 300
St. Louis, MO 63103
(314) 340-7662, ext. 236

CHARLES OGLETREE*
ROBERT J. SMITH
125 Mount Auburn St.
Third Floor
Cambridge, MA 02138
(617) 495-8285

**Counsel of Record for Petitioner*